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PERIODICALS:

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 52

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DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
*Petitioner,*

v.

UNITED STATES OF AMERICA, EX REL. EDGAR I. SHOTT, JR.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR REHEARING

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### QUESTION PRESENTED

This petition for rehearing does not contest the decision of this Court in so far as it holds that the doctrine of *Griffin* v. *California,* 380 U.S. 609 (1965), will not generally be retroactive. It raises only one

point which we do not think has been thoroughly considered by this Court. Neither the Court's decision in this case nor that in *Linkletter* has squarely focused upon the implications of these retroactivity rulings as they relate to pending habeas corpus cases which raise identical issues to those decided by the Court. We think that to deny the benefit of the new rule of constitutional law to such pending cases is to reduce habeas corpus to a limited and impotent remedy. We submit that the Court should hold that a case is "pending"—so that the rule of *Griffin* would be applied to it—where, as here, an application for habeas corpus has raised before the United States District Court and the Court of Appeals the precise question of the unconstitutionality of the *Adamson* doctrine,[1] where the Court of Appeals granted habeas corpus because it

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[1] In this regard, the Court's opinion implies that Respondent had not raised the issues decided in *Griffin* but merely attempted to take advantage of the benefits of that rule *after* it had been announced. The Court's slip opinion states (p. 2):

> "A few weeks after our denial of certiorari the respondent sought a writ of habeas corpus in the Unied States District Court for the Southern District of Ohio, again alleging various constitutional violations at his state trial, *but again not attacking the Ohio comment rule as such.*" [Emphasis supplied.]

The italicized phrase in the above quotation is an error. Respondent did raise the precise question of the unconstitutionality *per se* of the rule announced in *Adamson* v. *California*, 332 U.S. 46 (1947), both before the District Court and the Court of Appeals.

We have set out the relevant parts of the pleadings before these courts in Appendix A to this brief. The Court's misconception on this critical point may well be the fault of Respondent's counsel because we did not mention in our brief that we had raised the point in both lower courts. Our omission was due to our belief that so long as the matter had been before the Court of Appeals, as the opinion of that court reflected, it was irrelevant whether it had been previously presented.

agreed with Respondent, and where the State's petition for certiorari in this Court was pending at the time *Griffin* was decided. We also contend that the correctly decided decision of the Court of Appeals should not be reversed merely because it reached this Court on review of a decision granting habeas corpus instead of on a direct appeal from the Ohio Supreme Court.

## STATEMENT OF THE CASE

Respondent Shott was convicted for violation of the Ohio Blue Sky Law in a case which involved comment upon his failure to take the stand. Following affirmance of his conviction by the Supreme Court of Ohio, on December 29, 1962, notice of appeal to the United States Supreme Court was filed; and on February 27, 1963, the Jurisdictional Statement was submitted to this Court. On May 13, 1963, the Court granted a motion to dismiss the appeal, Mr. Justice Black dissenting, 373 U.S. 240 (1963). On June 7, 1963, a petition for rehearing was denied.[2]

In neither the original appeal nor in the petition for rehearing did we raise the issue of the unconstitutionality *per se* of comment on petitioner's failure to take the stand. In this respect, the appeal was limited to the question whether the particular comment was in violation of the standards of the *Adamson* rule as it had been stated by this Court.

Immediately upon the issuance of the mandate of this Court denying rehearing, Respondent filed a petition for habeas corpus in the Federal District Court on

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[2] Contrary to the statement in the Court's opinion, Respondent did petition for rehearing. See *Brief of Respondent*, p. 17, citing *Shott* v. *Ohio*, Petition For Rehearing, No. 877, October Term, 1962. *Denied*, 374 U.S. 858 (1963).

June 24, 1963, specifically raising the question "whether the Fifth Amendment right against self-incrimination is enforceable against the states through the Fourteenth Amendment."[3] Again, before the Court of Appeals—long before the *Malloy* or *Griffin* cases were decided by this Court—Respondent asserted that the rationale of the *Adamson* decision was no longer controlling as a matter of due process and that any comment whatsoever by the prosecutor violated the Fourteenth Amendment. Respondent stated to the Court of Appeals:

> "We submit that under federal constitutional standards it is a deprivation of due process of law for the State to permit a prosecutor to comment on the defendant's failure to take the stand. * * *
>
> "* * * the course is clear and [we] ask that this Court hold that the prosecutor's comments constitute a denial of due process and a deprivation of Appellant's rights against self-incrimination as guaranteed by the Fourteenth Amendment." Appellant's Brief, pp. 37-38, set forth in Appendix A., pp. 2a, 3a.

On June 15, 1964, over a year after Respondent had filed his habeas corpus application attacking the *Adamson* rule, this Court decided in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), that the Fourteenth Amendment incorporated the privilege against self-incrimination.

On the basis of the *Malloy* decision, reinforced by the previous decisions cited in Respondent's Brief, the Court of Appeals for the Sixth Circuit granted habeas corpus on November 10, 1965, on the sole ground that any comment on a defendant's failure to take the stand is unconstitutional. 337 F.2d 990 (6th Cir. 1964). It

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[3] See Appendix A, page 1a.

thus anticipated this Court's later ruling in *Griffin* v. *California.* It was not until April 28, 1965, six months after the decision in the court below, that this Court handed down its desision in *Griffin* v. *California,* reaching the same conclusion as the Sixth Circuit.

On May 24, 1965, this Court granted certiorari in Respondent's case. 381 U.S. 923. The State's petition for certiorari had not raised the point as to the retroactivity of the *Griffin* decision. Indeed, it was filed before *Griffin* was decided, and, essentially, simply urged a holding contrary to *Griffin.* This Court of its own motion requested argument on the retroactivity issue.

At the time that the *Griffin* case was decided, as far as we know, the only other proceeding attacking the constitutionality of the *Adamson* rule was that brought by Respondent in his petition for habeas corpus. The only decision rejecting the constitutionality of the *Adamson* rule had been made by the court below in granting habeas corpus to Respondent.

The conviction of Respondent was therefore not final in any factual sense at the time *Griffin* was decided. The Court of Appeals had granted habeas corpus. On remand, the United States District Court had directed the State court to give Respondent a new trial or release him. A petition for certiorari had been filed by the State to reverse the decision of the court below on habeas corpus. The mandate of the District Court to the State court was held in suspension until the decision of this Court on certiorari was issued. Therefore, in a factual sense, Respondent's case was pending both before the State court and before this Court at the time of the *Griffin* decision.

## ARGUMENT

### I

**In holding that the judgment against Respondent had become final before the Griffin decision, in the face of the fact that that judgment had been reversed and the precise issue decided by Griffin was on the way to this Court before Griffin was decided, this Court has promulgated a narrow and mechanical definition of "finality" and "pending case" which relegates habeas corpus petitions to second-class status and directly violates the principles expressed in Fay v. Noia.**

As we pointed out above, the plain fact is that the judgment against Respondent was not final at the time of the *Griffin* decision. Therefore, the Court's ruling that, because the case was pending on habeas corpus it must be treated differently than one on direct review, severely downgrades the role of habeas corpus and is plainly at odds with the philosophy articulated in a consistent series of this Court's recent decisions underscoring the primacy of habeas corpus. In *Smith* v. *Bennett,* 365 U.S. 708, 712-13 (1961), the Court stated:

> "over the centuries [habeas corpus] has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired' . . . ."

Moreover, "the language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." *Townsend* v. *Sain,* 372 U.S. 293, 312 (1963).

Yet, as a result of the Court's decision in the present case, the role of habeas corpus is not plenary at all. Respondent, a habeas corpus petitioner, has won his case; yet he must go to jail. On the other hand, a defendant who never even raised the issue on which the Supreme Court's decision was based, but whose case was pending on direct review, is nonetheless belatedly permitted to raise the constitutional issue after *Griffin* and, as a result, to go free.[4] Thus, after this Court has in recent years endeavored to give habeas corpus a role in the federal system consonant with "the extraordinary prestige of the Great Writ," (*Fay* v. *Noia,* 372 U.S. 391, 399 (1963)), its present decision is a great step backward, placing habeas corpus petitioners in a second-class status.

Not only is this Court's decision in the present case at war with the philosophy of its other habeas corpus decisions, but it is also directly contrary to the explicit directions given by the Court in *Fay* v. *Noia, supra,* which inform a defendant's counsel that petitions for certiorari while valid are nevertheless futile and time-consuming in the ordinary case and that the preferred way to raise a constitutional issue is by habeas corpus.

Respondent did not raise the issue of the unconstitutionality of *Adamson* in his petition for rehearing of his original appeal, though he could legitimately have

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[4] Compare *O'Connor* v. *Ohio,* Misc. No. 281, decided by this Court on December 13, 1965. In that case, the defendant, in appealing his conviction from the Ohio state courts, did not raise the *Adamson* issue in his petition for certiorari, which was denied. After *Griffin* was decided, O'Connor filed a petition for rehearing of the denial of certiorari, raising the *Adamson* issue for the first time. This Court granted the rehearing and vacated the Ohio judgment, remanding the case to the Ohio courts for proceedings in light of *Griffin* v. *California.*

done so since it was a new ground not embraced in the original appeal. However, the unconstitutionality *per se* of *Adamson* had not been raised or considered by the Supreme Court of Ohio. Thus, it appeared that Respondent could not meet the standards of Rule 19 of this Court's Rules of Procedure. Moreover, we were persuaded that we should not raise this issue on rehearing but rather raise it in a habeas corpus proceeding by the following language in *Fay* v. *Noia,* which had been decided immediately prior to our petition for rehearing:

> "The rationale of *Darr* v. *Burford* emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the expectation has not been realized in experience. *On the contrary the requirement of Darr* v. *Burford has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes. The goal of prompt and fair criminal justice has been impeded because in the overwhelming number of cases the applications for certiorari have been denied for failure to meet the standard of Rule 19.* And the demands upon our time in the examination and decision of the large volume of petitions which fail to meet that test *have unwarrantably taxed the resources of this Court.* Indeed, it has happened that counsel on oral argument has confessed that the record was insufficient to justify our consideration of the case but that he had felt compelled to make the futile time-consuming application in order to qualify for proceeding in a Federal District Court on habeas corpus to make a proper record.
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> * * * * *

> . . . Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide." 372 U.S. 391, 437-438 (1963). [Emphasis supplied.]

If Respondent had disregarded this language from *Fay* v. *Noia,* as the petitioner in the *O'Connor* case did (see, fn. 4 *supra*), and had sought on rehearing of his initial appeal to raise the constitutionality of *Adamson* in the face of Rule 19, he might have been[5] in the same situation as O'Connor and would have been released. Because he did not do so, he must go to jail. Thus, we find that by adopting habeas corpus as our remedy without first asking for rehearing on direct review, as O'Connor did, we have forfeited the rights of our client under the present decision of this Court that a pending proceeding on habeas corpus brought prior to the *Griffin* decision and pending before this Court is not a "pending case." The result is that O'Connor, who seems to us to have violated the Court's direction in *Fay* v. *Noia,* goes free. Respondent who followed that direction is sent to jail.

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[5] We use the words "might have been" instead of "would have been" because we have no way of knowing whether in 1963 this Court had reached that stage of what Professor Henry Hart of Harvard calls the maturing of collective thought which would have induced it to overrule *Adamson.* However, there were many indications that the Court was ready to reverse *Adamson* in those decisions which we cited in 1963 when we raised the precise issue before the District Court on habeas corpus. (See Appendix A). At the very least, therefore, our procedural error in relying on *Fay* v. *Noia* and not realizing that a habeas corpus proceeding was not a "pending case" deprived Respondent of an opportunity of being the first person to reach the Supreme Court on direct appeal.

The Court does not give any reason, nor do we think any can be found, justifying this result. But if a reason can be found showing that Respondent has misinterpreted the language of *Fay* v. *Noia,* we suggest that the ruling in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964), cited by this Court in its original decision, should give him relief. In *England* the decision of this Court protected the petitioners from a forfeiture of their rights as a result of an erroneous, but reasonable, interpretation of prior decisions of this Court. By the same token, Respondent should not be penalized for his reasonable attempt to follow the teachings of this Court in *Fay* v. *Noia.*

## II

**The denial of retroactive application to cases pending on habeas corpus at the time of Griffin has no rational basis in terms of the reasons the Court gives for limiting retroactivity.**

Speaking generally, the reason for denying retroactivity to a decision which overrules a previously decided case is that parties who have relied on the previous authority should not be penalized. For example, in many civil cases it has been held that the new decision is "purely prospective." This is because a party in a civil suit who has based his conduct on a decision which is being overruled should not pay damages or otherwise suffer because he has followed the law as previously announced by the Court. *E.g., Gelpcke* v. *Dubuque,* 68 U.S. (1 Wall.) 175 (1864); *Anderson* v. *Santa Anna,* 116 U.S. 356 (1886); *Allen* v. *Holbrook,* 103 Utah 319, 135 P.2d 242 (1943).

In criminal cases, as this Court has recognized in *Griffin,* different considerations apply. There the in-

terest of the state is involved. A few states relied on the *Adamson* and *Twining* decisions for many years. The Court found that the administration of justice in such states might, therefore, be impaired if every convicted inmate of the penitentiary would have to be retried under the new ruling in *Griffin*. The majority of this Court thought that this consideration outweighed the deprivation of constitutional rights which would result from the failure to make *Griffin* generally retroactive as to judgments which had become "final" at the time of the *Griffin* decision.[6] We believe that the principal consideration which prompted the Court to hold the *Griffin* rule generally prospective was to avoid the factual situation which occurred in *Linkletter*

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[6] In this connection the Court said:

"The last important factor considered by the Court in *Linkletter* was 'the effect on the administration of justice of a retrospective application of *Mapp*.' 381 U.S. at 636. A retrospective application of *Griffin* v. *California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*. A retrospective application of *Mapp* would have had an impact only in those States which had not themselves adopted the exclusionary rule, apparently some 24 in number. A retrospective application of *Griffin* would have an impact only upon those States which have not themselves adopted the no comment rule, apparently six in number. But upon those six States the impact would be very grave indeed. It is not in every criminal trial that tangible evidence of a kind that might raise *Mapp* issues is offered. But it may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio, in which the defendant did not take the witness stand in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years." Slip Opinion, pp. 12-13.

where, *immediately after Mapp was decided,* the petitioner filed a habeas corpus application. However, the desire to avoid this result with respect to *Griffin* simply cannot justify treating a pending habeas corpus proceeding raising the identical issue in the same fashion as a case which was not pending at the time *Griffin* was decided. So far as we know, Respondent's case is the only one which had raised the constitutionality of *Adamson* at the time *Griffin* was decided. Certainly there can be no effect whatever on the general administration of justice in Ohio or elsewhere if *Griffin* is made retroactive with respect to this single Respondent or to any others who might have similarly raised the same issue.

We submit that the proper distinction between direct review and so-called collateral attack is one which goes no further than to limit those issues which can properly be raised on collateral attack to such matters as constitutionality, newly discovered evidence, etc. However, with respect to those issues which have been properly raised on collateral attack, the case remains pending on such issues until they are decided; the judgment is not final until the decision on the collateral attack becomes final. In stating that the judgment was final against Respondent in the face of the fact that he has *won* his case on collateral attack in the court below, this Court is going back to the technicalities of the old Common Law writ system where a plaintiff with a just cause of action lost because he brought his action in trespass rather than trover.

Thus, we do not here challenge the Court's general statement that *Griffin* should not be applied retroactively to a case in which the judgment of conviction was final prior to the announcement of the *Griffin* rule.

However, we do assert that the Court's decision to draw the line of "finality" at the point of the conclusion of direct review, so as to exclude pending habeas corpus cases, imposes an unfair result which is neither necessitated nor justified by the policy against wholesale jail delivery which the Court is attempting to avoid.

## III

**The discriminatory line drawn by this Court to cut off the rights of pending habeas corpus petitioners cannot be defended on the basis of any of the Court's previous decisions.**

When this Court decided in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), that the *Mapp* rule was to be generally prospective, it limited retroactivity to cases which had not become "final" before *Mapp* was decided. As far as determining when a case became "final," the Court offered the following guidance:

> "By final we mean where the judgment of conviction was rendered, *the availability of appeal exhausted,* and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio.*" 381 U.S. at 622, n. 5. [Emphasis supplied.]

The precise issue whether a distinction should be made between a case pending on habeas corpus and one pending on certiorari was not before the Court in *Linkletter.* Reading the above quotation in connection with the explicit directions in *Fay* v. *Noia,* we thought that the words "where . . . the availability of appeal [was] exhausted" should be liberally construed to include an appeal to the United States Court of Appeals, the direct review of which is now before this Court. In its present opinion, however, this Court adopts a narrow and strict interpretation of the above quoted language which at most was only a dictum in *Linkletter.*

In announcing this rule of limited retroactivity in *Linkletter,* the Court relied on a line of cases which we think are wholly inapposite. Each of these decisions involved a statutory change, constitutional amendment or new treaty agreement which intervened between the time of trial and appeal. In such cases, sensibly, the courts applied the provisions of the newly enacted legislation. *E.g., United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 102 (1801); *Carpenter* v. *Wabash Ry.,* 309 U.S. 23 (1940).

In *none* of these cases, however, was the question of retroactivity involved. The Court could not apply the new statute retroactively because Congress had made it purely prospective. For instance, the prohibition cases simply mean that no defendant could be convicted and imprisoned in any case which had not been finally decided at the time the law was repealed. In other words, a defendant could not be sent to jail for a crime which did not exist at the time his case was considered by the reviewing court. Thus, in *United States* v. *Chambers,* 291 U.S. 217 (1934), the defendants had been indicted for violating the National Prohibition Act while the Eighteenth Amendment was still in effect, but prior to trial, that Amendment was repealed. The Supreme Court affirmed the trial court's dismissal of the indictment on the ground that defendants could not be convicted for conduct which the law no longer made criminal.[7]

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[7] The Court, in *Chambers,* added:

> "We are not dealing with a case where final judgment was rendered prior to . . . [repeal]. Such a case would present a distinct question which is not before us." 291 U.S. at 226.

And in *Massey* v. *United States,* 291 U.S. 608 (1934), the Supreme Court reversed a conviction under the Prohibition Act for the benefit of a defendant who, prior to the repeal of the Act,

It is clear that the repeal of the Prohibition Act could not have a retroactive effect. It was not, as in the case of *Griffin,* an admission by the Court that a former decision had been erroneous. No writ of habeas corpus could legitimately have been brought before the repeal of prohibition. Therefore, this Court's distinction between habeas corpus and certiorari cannot be drawn from the *Chambers* line of decisions.

In contrast, in the case of the overruling of a decision, the Court has power to apply equitable principles to the question of retroactivity. For example, if this Court had declared on habeas corpus that the Prohibition Act was unconstitutional, the case would be analogous to the case at bar, but not otherwise.

In sum, the Respondent in this case is the first person to be penalized by the harsh, mechanical rule limiting retroactivity to cases pending on direct review. As a result of the misapplication of the *Chambers* line of decisions, Respondent is being sent to jail, although his habeas corpus application was filed, and was decided in his favor, long before this Court's ruling in *Griffin.*[8]

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had been granted a stay of mandate pending the filing of a petition to the Supreme Court for certiorari. The petition was actually filed after the repeal had taken place. This Court held that under these circumstances the judgment of conviction was not final at the time of the appeal of the Prohibition Act and therefore ordered the Court of Appeals to dismiss the indictment.

[8] In *Linkletter,* the Court also cited *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941), a decision somewhat more similar to the present one. That case held that if there was a change in decisional law by a State Supreme Court which intervened between the trial and appeal of a civil diversity case in the federal courts

## IV

**By limiting the retroactivity of Griffin to cases pending on direct review, this Court has promulgated a rule which, if consistently applied, will bring about absurd results.**

In *Jackson* v. *Denno*, 378 U.S. 368 (1964), the Court overruled *Stein* v. *New York*, 346 U.S. 156 (1953), thereby establishing a new principle of constitutional law.[9] Although the issue was brought up on habeas corpus and not direct review, the Court nonetheless applied the new principle to the case before it and ordered defendant's release.

Suppose that, as might well have happened in this case, Respondent had won his race with *Griffin* and reached the Supreme Court first. Would it have been

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litigating the same issue, the new State rule would be controlling. There is, however, nothing in the Court's decision in *Vandenbark* to indicate that it was limiting its rule to cases on direct review. In fact, of all the decisions holding that a case on appeal is to be governed by the legislation enacted afer the trial, there is only one case even discussing the issue in the context of "direct review" and this case was not even mentioned in the *Linkletter* or *Shott* decisions. In *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964), the Negro defendants were convicted for violation of a State trespass statute when they engaged in a "sit-in" demonstration at the lunch counter of a retail store. Prior to final judgment, their conduct was in effect legalized by the passage of the Civil Rights Act of 1964. The Supreme Court therefore reversed their convictions, stating:

> "... [We have] noted the existence of a body of federal and state law to the effect that convictions *on direct review* at the time the conduct in question is rendered no longer unlawful by statute, must abate."

379 U.S. at 312. [Emphasis supplied.] As previously pointed out, cases such as these, involving *statutory* changes, are altogether unlike the present decision.

[9] See also *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Leyra* v. *Denno*, 347 U.S. 556 (1954).

possible for this Court to have declared *Adamson* unconstitutional and at the same time, in the light of the teachings of *Fay* v. *Noia* and *Jackson* v. *Denno,* to have reversed the Court of Appeals' grant of habeas corpus to Respondent? We doubt it. Yet a literal construction of the holding of this Court, which places habeas corpus in a second class status, would have required the Court to send Respondent to jail because he had raised the issue of constitutionality at the wrong time in the proceedings.

In the alternative, assuming that this Court would adhere to its practice in *Jackson* v. *Denno,* then had Respondent reached this Court first, the new rule of constitutional law would have been applied to him, even if this rule were not given general retroactive effect. This is precisely as it must be in our adversary system of criminal justice; certainly the widely heralded protections of habeas corpus would be a mockery if one who took advantage of them and was proved right in his assertions, were to be denied the benefits of the new rule of constitutional law and find that his efforts had been merely *pro bono publico.*[10] Thus, under the rule of *Jackson* v. *Denno,* had Shott reached this Court before Griffin, the new principle of constitutional law overturning *Adamson* would have become the rule in Shott's case rather than Griffin's and Shott would then have been free. But, under the Court's mechanical rules, Shott must go to jail simply because

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[10] Note that this Court in *Griffin* recognized that it was a retroactive application to apply the new principle of constitutional law announced in that case to the party before it. Nevertheless, the "rule in *Griffin* was applied to reverse Griffin's conviction." *Tehan* v. *Shott,* decided Jan. 19, 1966, Slip Opinion, fn. 2. Accord, as regards the *Mapp* decision, see *Linkletter* v. *Walker,* 381 U.S. at 623.

some other person got to this Court first, raising precisely the same issue on direct review that Shott was raising on collateral review. Having filed his petition for habeas corpus, Shott's only hope of freedom was to win the race to this Court. This reduces the protections of The Great Writ to nothing more than a pari mutuel ticket—a chance for freedom if your case reaches the finish line first.

In light of these substantial defects inherent in the rule announced by the Court, we have tried to ascertain what considerations—unmentioned in the Court's opinion—may have prompted this Court not to apply the *Griffin* decision to habeas corpus petitioners like Shott whose pending writs challenged the *Adamson* rule. The only possible "reason" we can imagine is the Court's fear that applying *Griffin* retroactively to pending habeas corpus petitions might encourage "frivolous" habeas corpus applications. In other words, it might be feared that convicted prisoners, anticipating a constitutional change at some time in the distant future, would file endless habeas corpus applications in order to assure that their writ would be pending when and if a particular rule of constitutional law is some day overruled.

However, this ungrounded assumption assumes a level of sophisticated legal planning which is clearly nonexistent among prisoners and which can pose no serious threat to the administration of justice. And even if a prisoner did file a writ of habeas corpus every year, believing that this Court would some day hold that a particular previous decision denied his constitutional rights, clearly he should not be penalized

merely because he had a continuing faith that this Court would some day correct its past mistake.[11]

## CONCLUSION

Under the Court's opinion in this case, Respondent still has the opportunity to present to the Court of Appeals his contention that the nature of the prosecutor's comment in this case deprived Respondent of due process, even under the *Adamson* rule. But even if he wins on this point, he will suffer a severe penalty. He has been attempting to practice law for many years, with a jail sentence hanging over his head and a disbarment proceeding pending before the Ohio Supreme Court. If the case is remanded, these difficulties may continue for as much as a year. We do not think that such an additional penalty is justified by the artificial definition of a "pending case" adopted by this Court.

If forced to reargue these issues, we are hopeful that the court below will sustain our contention, even within the bounds of *Adamson,* that a man who signs a single promissory note cannot be convicted consistent with due process where the sole evidence is the comment of the prosecuting attorney that he must be guilty or else he would have taken the stand. But we see no reason in the orderly administration of justice to compel the Court of Appeals to interpret the *Adamson* rule in a

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[11] In the past this Court has not hesitated to confer important rights on habeas corpus petitioners where justice so required, even though a side effect of the decision might be to encourage frivolous writs of habeas corpus. *E.g.*, compare Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313 (1947), and Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 444-53 (1963), with *Fay* v. *Noia,* 372 U.S. 391 (1963).

novel case such as this long after that rule has been declared unconstitutional by this Court. In remanding the case, this Court is in effect asking the Court of Appeals to decide the following question: "If this Court had not declared the *Adamson* Rule unconstitutional, what constitutional limits do you think this Court would have put on its exercise?"

We urge that this Court abandon the technical and artificial definition of a "pending" case which excludes the proceeding brought by Respondent which was actually pending long before either *Griffin* or *Malloy* were decided. To inflict this unju[illegible] penalty on Respondent is wholly unnecessary to support the main decision in this case. As we note above, to send the case back to the Court of Appeals is to require that court to decide the moot question as to what might have been the limitations on *Adamson* if *Adamson* were still the law. The result of such a remand may be to send Respondent to jail, cause his disbarment, and deprive his family of a livelihood. Such risks to an individual should not be lightly brushed aside in order to support an arbitrary and unrealistic definition of a "pending" case. And the future consequence may well be that no cautious attorney will dare take the chance of failing to apply for certiorari and rehearing on certiorari

before he resorts to the now dubious writ of habeas corpus.

Respectfully submitted,

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